

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 33 OF 2002.

Shri Datta Ram Bhonsle,
major, married,
resident of Fontainhas,
Panaji, Goa.

...

Appellant.

VERSUS

Smt. Ashalata Chodenkar,
widow of Damvelar Chodenkar,
resident of Mala, Fontainhas,
Panaji, Goa.

...

Respondent.

Mr. Sudin Usgaonkar, Advocate for the Appellant.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe,
Advocate for the Respondent.

CORAM: P. V. KAKADE, J.

DATE: 3RD OCTOBER, 2002.

ORAL JUDGMENT:

Rule. Rule made returnable immediately.

2. This Second Appeal is filed by the unsuccessful defendant against the judgment and order passed by the District Judge, North Goa, Panaji in Regular Civil Appeal No. 74/1995, whereby his appeal was dismissed which was preferred against the judgment and decree passed by the Civil Judge Senior Division, Panaji in Civil Suit No. 24/90/B decreeing the suit for perpetual injunction simpliciter in favour of the plaintiff.

3. The respondent/plaintiff came with a case

that she was the owner in possession of the residential house situated in property bearing Chalta No.110 and partly in Chalta No.148 of P.T. Sheet No.74 of Panaji city. The said property bearing Chalta No.148 and 110 of P.T. Sheet No. 74 of Panaji city originally belonged to one Neugi and the same was possessed and enjoyed by the plaintiff for several decades. According to the plaintiff appellant/defendant was trying to take law into his own hands and was preparing to evict him from the suit property and hence the suit for perpetual injunction.

4. The defendant contested the suit denying all the allegations made by the plaintiff and submitted that the structure referred to in para 3 of the plaint was illegally constructed by the plaintiff for which an order for demolition was issued. The said order was stayed by the Civil Judge in Civil Suit No. 9/86/B. According to the defendant he was in possession of the land bearing Chalta No.74 of the city of Panaji.

5. The learned Civil Judge adjudicated the dispute on merits raising a solitary issue and held that the plaintiff had proved that she was in possession and enjoyment of the property bearing Chalta No.148 and 110 of P.T. Sheet No.74 of Panaji city and accordingly decreed the suit. The appeal was carried

to the District Court, Panaji wherein the learned District Judge in the said appeal upheld the reasoning and finding recorded by the learned Civil Judge and dismissed the appeal. Hence the Second Appeal.

6. I have heard the learned counsel for both sides and perused the record including both the judgments of the lower Courts. At the outset it may be noted that the only substantial question of law sought to be raised primarily is that the learned lower appellate Court Judge totally ignored to take into account the existence of the document produced on behalf of the defendant which would have tilted the scales of justice in his favour. Now it is admitted as well as evident position that the plaintiff as well as the defendant are not claiming to be owners by virtue of ownership title to the suit property and their respective claims are based on possessory titles i.e. of actual physical enjoyment of the suit property. In fact, it appears that there is no dispute that the portion of the house of the plaintiff was situated in the suit property and it was also admitted fact that the defendant did not file any suit against the plaintiff for having constructed the house in the suit property. I have perused the plaint and the written statement vis-a-vis the oral evidence on record. It is but clear that the entire issue involved is decided and

adjudicated on the basis of oral evidence before the trial Court, which aspect was also upheld by the learned lower appellate Court Judge.

7. Mr. Usgaonkar, The learned counsel for the appellant strongly raised an issue to the effect that in fact the defendant had come with documentary evidence namely the city survey record which showed that the mother of the defendant was in actual possession of the suit property. In this regard my attention was invited by both the counsel to the evidence led by the parties. The defendant in his oral evidence did state that the suit property was in his possession and he has produced the xerox copy of the survey record of Chalta No.148 and 110 of P.T. Sheet No.74 which showed that both the properties were held by the Government and occupied by S. Bhonsle i.e. mother of the defendant. The copy was obviously marked as 'X' for identification due to the reason that it was not a certified copy. The defendant has further stated that he was unable to produce the original plan as he did not receive the certified copy. Therefore the question is whether uncertified unauthenticated xerox copy of the city survey record could be the proper piece of evidence on behalf of the defendant to show his possessory title of the property in question. In the course of his arguments, the learned counsel for

the defendant also brought to my notice that the xerox copy of the city survey record which was sought to be produced before the Court and was marked 'X' for identification was of the year 1984. Moreover, the name of the mother of the defendant is shown in column 4 which definitely is relating to the names of "claiming parties" to the property.

8. On the other hand, it was submitted on behalf of the Respondent that the certified copy of the city survey record of the same property for the year 1999 was conspicuously silent regarding the names of either of the defendant or his mother and the property was shown to be held by the Government. Obviously, therefore it is clear that the name of the mother of the defendant was at the most at the relevant time on record as claiming party, but that does not help the defendant to show that settled possession was in his favour in that regard at the relevant time.

The learned counsel for the appellant invited my attention to the ruling of the Apex Court in the case of **Ishwar Dass Jain (dead) through LRs v. Sohan Lal (dead) by L.Rs.** (A.I.R. 2000 S.C., 426), wherein the ratio laid down by the Supreme Court is to the effect that "where certain vital documents for deciding the question of possession were ignored such as a

compromise, an order of the revenue Court reliance on oral evidence was unjustified". In my considered view there cannot be two opinions regarding the ratio laid down by this ruling. However, the question is whether the xerox copy of the city survey record formed a piece of legal evidence before both the Courts below.

9. In this regard my attention was also invited to the fact that a plan of the impugned property was produced before the lower Court and it appears from the record that the learned counsel for the plaintiff had no objection for taking the record for exhibiting the survey plan which was marked 'X' for identification. However, it cannot lie in the mouth of the appellant to state that since the plan itself was certified copy and therefore was allowed to be taken on record, its annexures which were merely xerox copies would also go into evidence blindly. The law does not allow it. Therefore the case as it exists is city survey record was not taken into account by the learned lower appellate Court rightly.

In this regard, once we reach this position, in my considered view the ratio laid down by the Supreme Court in **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and others** reported in (1999) 3 S.C.C., 722 would come into play, wherein it is noted that the concurrent

findings of fact, howsoever erroneous, cannot be disturbed under Section 100 of C.P. Code especially when no substantial question of law could be agitated at this stage. In the present case, before us no doubt the learned lower appellate Court Judge did not specifically refer to the solitary document which was brought on record on behalf of the defendant i.e. xerox copy of the city survey record. However, that does not vitiate the finding recorded by him especially when the said document could not be read into evidence at all and therefore the case was decided strictly on the basis of oral evidence and obviously the possessory title of the plaintiff was held to be proved and findings were recorded in that regard.

10. In view of these aspects, I have no hesitation to hold that the second appeal does not lie when there are no substantial questions of law involved.

11. In the result, Second Appeal stands dismissed summarily with no order as to costs.

P. V. KAKADE, J.

sl.